Supreme Court, U.S.
FILED
OCT 26 1992
OFFICE OF THE CLERK

92-804

No.

IN THE
SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1992

ARTHUR WALLENSTEIN, DIRECTOR, *Petitioner*,

v.

DAVID SCHWENDEMAN, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Under the Due Process Clause of the Constitution, which of the following tests governs the validity of a permissive inference: (a) the inference is valid unless, under the facts of the case, there is no rational way the jury could make the connection permitted by the inference, as held by this Court in *Ulster County v. Allen*; or (b) the inference is valid only if there is substantial assurance that the inferred fact more likely than not flowed from the proven fact, as held by the Ninth Circuit in the present case?

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No.

IN THE SUPREME COURT

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OCTOBER TERM, 1992

ARTHUR WALLENSTEIN, DIRECTOR,

Petitioner,

v.

DAVID SCHWENDEMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on July 27, 1992.

I. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the district court and remanding with instructions to issue the writ unless Schwendeman is granted a new trial within a reasonable time, is reported at 971 F.2d 313

(9th Cir. 1992) and appears at Appendix A. The unreported order and judgment of the district court adopting the report and recommendation and denying Schwendeman's petition for federal habeas relief appears as Appendix B. The magistrate judge's report and recommendation, later adopted by the district court, appears as Appendix C.[1] The Washington Supreme Court denied discretionary review of the lower appellate court's dismissal of Schwendeman's post-conviction petition, and that ruling appears at Appendix E.

II. JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 27, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . ."

Title 28, Section 2254(a) of the United States Code provides, in pertinent part:

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[1]The object of Schwendeman's petition, as well as the district court's decision thereon, focused on instruction number seven of Schwendeman's state court trial, the text of which appears in Appendix D.

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

IV. STATEMENT OF THE CASE

Schwendeman was convicted of two counts of vehicular assault in King County Superior Court.[2] One of the elements of the crime of vehicular assault required the State to prove that Schwendeman was driving recklessly. When instructing Schwendeman's jury, the trial court utilized a pattern instruction that contained a permissive inference.[3]

In a subsequent state post-conviction proceeding, Schwendeman presented the Washington Supreme Court with the following issue: "Instruction No. 7 creates an unconstitutional presumption or inference, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution . . . because the inferred fact of reckless driving does not flow more likely than not from the proven fact of driving in excess of the maximum lawful speed." Schwendeman

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[2]The facts presented to the jury at trial revealed that Schwendeman had been driving his pick-up truck, with a load of passengers in the back, down a rural road at night at speeds of up to 50 miles per hour while weaving back and forth intentionally. Schwendeman crashed into a telephone pole while driving in this manner, resulting in serious injury to his passengers.

[3]Instruction seven provided: "A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner. This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is given."

asserted that the instruction violated due process because it permitted the jury to infer the element of recklessness simply from evidence that he drove in excess of the lawful speed limit. See Appendix E, p.1.

In its ruling denying discretionary review of Schwendeman's state post-conviction petition, the Washington Supreme Court noted that the instruction simply informed the jurors that they "may infer" recklessness from proof of excessive speed, but that the inference was "not binding" upon them. The Washington Supreme Court agreed with the Court of Appeals that the instruction created a permissive inference. The Court noted that a permissive inference, such as Schwendeman's, comports with the requirements of due process: (1) if the suggested conclusion is one that reason and common sense justify in light of the proven facts before the jury; and (2) if, under the facts of the case, a rational trier of fact could make the connection permitted by the inference.[4] Since instruction seven met these requirements, it was upheld. *See* Appendix E, pp 2-3.

Similarly, the district court found Schwendeman's instruction to be a permissive inference because it "allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and places no burden of any kind on the defendant." See Appendix C, p.3 (quoting *Ulster Cy. v. Allen*, 442 U.S. 140, 157 (1979)). The district court went on to note that such permissive inferences

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[4]In so holding, the Washington Supreme Court cited to and quoted from this Court's decisions in *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985) and *Ulster Cy. v. Allen*, 442 U.S. 140, 157 (1979).

affect "due process only if 'under the facts of the case, there is no rational way the trier could make the connection permitted from the inference.'" *Ibid.* (quoting *Ulster Cy. v. Allen, supra*).

Applying the facts of Schwendeman's case to the law as announced by this Court in *Ulster Cy. v. Allen, supra,* the district court held that in Schwendeman's case, there was a clearly sufficient, rational connection between the evidence of speeding and the factual conclusion that Schwendeman was reckless. The district court noted that the jury was presented with evidence that Schwendeman was driving on a rural road, after dark, traveling at least 39, and possibly 50 miles per hour in a 25 mile per hour zone and hit a telephone poll while intentionally weaving. *See* Appendix C, p. 4.

In reviewing the district court's decision on appeal, the circuit court observed that "[t]here was plenty of evidence to support Schwendeman's conviction." *See* Appendix A, p.3. However, the circuit court wrongly found Schwendeman's instruction to be unconstitutional, ruling that "[a]lthough it is certainly true that excessive speed is probative of a jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed." See Appendix A, p.6. Therefore, while purportedly relying upon this Court's decision in *Ulster Cy. v. Allen*, the Ninth Circuit reversed and remanded the matter to the district court with instructions to grant the writ if Schwendeman is not retried within a reasonable time. See Appendix A, p. 7.

V. REASONS FOR GRANTING THE WRIT

A. Certiorari Should be Granted Because the Ninth Circuit's Decision Ignores the Facts Presented at Trial, Treats a Permissive Inference as If It Were a Burden-Shifting Presumption and Clashes With This Court's Opinion in *Ulster County v. Allen*.

The Ninth Circuit held that the constitutional standard for evaluating entirely permissive inferences is to ascertain whether, in theory, the inferred fact is more likely than not to flow from the proved fact on which it is made to depend.[5] This evaluation is to be made without reference to the facts of the case. However, the Ninth Circuit's standard is based upon a misapplication and misinterpretation of this Court's decision in *Ulster Cy. v. Allen*, which held that a permissive inference is valid unless the defendant proves that, under the facts of that defendant's case, no rational trier of fact could have made the connection permitted by the inference.

Petitioner does not dispute that the State must prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). This elementary principle prohibits the State from utilizing an evidentiary mandatory presumption that relieves the State of its burden of proof on one or more elements of an offense. *Sandstrom v. Montana*, 442

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[5]In so holding, the Ninth Circuit cited to *United States v. Rubio-Villareal*, 967 F.2d 294, 296 (9th Cir. 1992) (*en banc*) (a decision relying upon the circuit court's supervisory powers) which in turn cited to this Court's decision in *Ulster Cy. v. Allen*, 442 U.S. 140, 166 n.28 (1979) (footnote 28 containing a direct quote from this Court's decision in *Leary v. United States*, 395 U.S. 6, 36 (1969)).

U.S. 510 (1979).[6] However, such presumptions, even if rebuttable, must be distinguished from entirely permissive inferences that allow, but do not require, the jury "to infer the elemental fact from proof by the prosecutor of the [inferred fact] and which places no burden of any kind on the defendant." *Ulster Cy. v. Allen*, 442 U.S. at 156-57.

The *Allen* Court noted that inferences and presumptions are frequently utilized in factfinding. *Allen*, 442 U.S. at 156. In criminal cases, the general rule in testing the constitutionality of such devices is whether they undermine the factfinder's duty, based upon all the evidence presented by the prosecution, to find the ultimate facts beyond a reasonable doubt. *Allen*, 442 U.S. at 156. This Court reasoned that since a permissive inference leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it would affect the application of the reasonable doubt standard only if, under the facts of the particular case, there was no rational way the trier of fact could make the connection permitted by the inference. Only if there was no rational way the trier of fact could make the connection, can it be said that the permissive inference caused the presumptively rational factfinder to make an erroneous factual determination. *Allen*, 442 U.S. at 157.

At issue in *Allen* was a New York statute that provided: "The presence in an automobile . . . of any firearm . . . is

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[6]In *Sandstrom*, which was decided two weeks after *Allen*, this Court held that mandatory presumptions violate due process because they relieve the prosecution of its burden of proof.

presumptive evidence of its possession by all persons occupying such automobile at the time [the firearm] is found . . . ." *Allen*, 442 U.S. at 142 n.1. In analyzing the rebuttable presumption at issue in *Allen*,[7] this Court looked to its prior decision in *Leary v. United States*, *supra*, which examined a rebuttable presumption regarding the knowing importation of marijuana into the United States: "Whenever . . . the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." *Leary*, 395 U.S. at 30.

At issue in both *Allen* and *Leary* were rebuttable presumptions that allowed the prosecution to prove an element of the offense through the presumption. The presumptions were rebuttable because once the prosecution proved the presumed fact, it shifted the burden of proof to the defendant who could then overcome the presumption through presentation of contrary evidence.

The similarities between the two presumptions at issue explains the *Allen* Court's reference to *Leary* in its footnote 28, the footnote cited by and relied upon by the Ninth Circuit for its

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[7]The trial court instructed the jury that the presumption was rebuttable. *Allen*, 442 U.S. at 160-61 n.19 and 20.

ruling in Schwendeman's case.[8] However, both the *Allen* and *Leary* Courts were discussing the standard for evaluating burdenshifting, rebuttable presumptions, not non-burdenshifting, permissive inferences that do not shift the burden of presenting evidence to the defendant.

In applying *Allen* below, the Ninth Circuit disregarded this Court's explanation of permissive inferences in Part II of the *Allen* decision. In *Allen*, this Court held that: (1) permissive inferences do not shift the burden of proof to the defendant; (2) such inferences are not to be judged on their face; (3) permissive inferences must be evaluated under the facts of the particular case; (4) the defendant must demonstrate the inference's invalidity as applied to him; and (5) the inference is only invalid if, under the facts of the defendant's case, there is no rational way the trier of fact could make the connection permitted by the inference. *Allen*, 442 U.S. at 156-57.[9]

Instead of applying this Court's analysis as set forth in *Allen*, the Ninth Circuit applied a standard to permissive inferences that judges them on their face. The Ninth Circuit's standard requires the inference, in the abstract, to be more likely

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[8] *Allen's* footnote 28 reads: "'The upshot of *Tot*, *Gainey* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.' 395 U.S. at 36, 89 S. Ct. at 1548. *Allen*, 442 U.S. at 166."

[9] In *Francis v. Franklin*, 471 U.S. 307 (1985), this Court noted that *Allen* also stands for the proposition that "a permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Franklin*, 471 U.S. at 314-15.

than not to flow from the proved fact, and disregards both the facts of the case generally and the facts in support of the inference itself. However, such a stark and sterile rule is divorced completely from the facts presented at trial and presumes that the factfinder will act in an irrational manner.

The Ninth Circuit's rule allowed it to judge Schwendeman's instruction in isolation, without reference to the facts. Its analysis was confined to whether speeding was usually reckless. Since proof of going only one or two miles over the speed limit is probably not reckless, the Ninth Circuit felt free to strike Schwendeman's instruction. Such superficial analysis puts form over substance and has no place in a criminal justice system which presumes that its juries operate in a rational manner.[10] Under the Ninth Circuit's misguided reasoning, a reviewing court is prohibited from examining the specific evidence presented regarding the proven fact (speeding), as well as the evidence presented regarding the inferred fact (recklessness).

The Ninth Circuit did not even bother to examine the evidence of speeding that was presented to Schwendeman's jury and which showed he was driving as fast as 50 miles per hour, a speed that was 25 miles per hour over the limit. Similarly, the Ninth Circuit did not look to the evidence of recklessness presented to Schwendeman's jury which showed him to be driving a pick-up truck with passengers in the back, down a rural road,

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[10]Indeed, the substantive portion of the Ninth Circuit's decision below began "There was plenty of evidence to support Schwendeman's conviction." *See* Appendix A.

at night, at a speed of 50 miles per hour while weaving back and forth intentionally and culminating in his driving into a telephone pole and injuring his passengers.

The Constitution's standard for evaluating a non-burden shifting, entirely permissive inference requires the defendant to prove that the inference was invalid, as applied to him, by demonstrating that under the facts of the defendant's case, no rational trier of fact could make the connection permitted by the inference. This standard fully comports with the requirements of due process because it does not shift the burden of proof and leaves the trier of fact free to credit or reject the inference.

B. The Rule Announced by the Ninth Circuit is Contrary to the Standard Other Circuits Apply for Judging the Constitutionality of a Permissive Inference and Has Therefore Created a Split in the Circuits.

The Ninth Circuit has created a rule that is contrary to the rule followed by the other circuits in judging the constitutionality of a permissive inference. This Court should grant certiorari in order to clearly announce the Constitution's standard for evaluating a permissive inference and thereby resolve this split in the circuits.

The Eleventh Circuit has set a standard that complies fully with this Court's decision in *Allen* and is in accordance with the standard suggested by Petitioner. *United States v. Gaines*, 690 F.2d 849 (11th Cir. 1982). The Eleventh Circuit places the burden of demonstrating the invalidity of a permissive inference on the party challenging the inference. An instruction based upon a "permissive inference will be overturned 'only if, under the facts of the case, there is no rational way the trier could make the

connection permitted by the inference.'" *Gaines*, 690 F.2d at 854 (quoting *Ulster Cy. v. Allen*, 442 U.S. at 157).

The Tenth Circuit has a similar standard that is derived from this Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985). The Tenth Circuit holds that a permissive inference violates due process only if the inference's suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. *Davis v. Maynard*, 869 F.2d 1401, 1405 (10th Cir. 1989), reinstated after remand, 911 F.2d 415 (1990). The Tenth Circuit upheld the permissive inference in Davis' case "because a rational trier of fact could easily" have made the connection permitted by the inference. *Ibid.*

In a case that also relies upon the *Allen* Court's reference to *Leary*, the Third Circuit noted that a "permissive presumption" does not offend due process if "there is a 'rational connection' between the basic facts and the ultimate facts and the ultimate fact is 'more likely than not to flow from' the former." *McCandless v. Beyer*, 835 F.2d 58, 60 (3rd Cir. 1987) (quoting *Leary*, *supra*). However, the Third Circuit, unlike the Ninth Circuit, was careful to admonish that a reviewing court "should not assess the constitutionality of a permissive presumption on its face; instead, it must evaluate a presumption's rationality in light of all the facts adduced at trial." *Ibid.* Applying this standard to McCandless' case, the Third Circuit held that the permissive "presumption complies with due process as applied to petitioner." *McCandless*, 835 F.2d at 61.

In another case that references *Leary*, the Seventh Circuit held that, in evaluating the constitutionality of a permissive

inference the proper focus of the analysis is on the facts of the individual case. "[T]herefore the question is whether the jury, considering the facts presented in this case, could rationally make the connection allowed in the presumption. *Crowley v. Winans*, 920 F.2d 454, 456 (7th Cir. 1990) citing *Ulster Cy. v. Allen*, 442 U.S. at 157.

The Eighth Circuit has held that *Francis* and *Allen* stand for the proposition that "a permissive inference violates due process only if the suggested conclusion is not one that reason and common sense justify in light of the facts before the jury." *United States v. Roberts*, 844 F.2d 537, 548 (8th Cir. 1988). The Sixth Circuit holds that the Constitution's standard for determining the validity of a permissive presumption is whether "there be a rational connection between the facts proved and the facts presumed." *Morgan v. Shirley*, 958 F.2d 662, 667 (6th Cir. 1992) (citing *Tot v. United States*, 319 U.S. 463, 467 (1943) and *Leary v. United States*, 395 U.S. at 33).

The Fourth Circuit relies on *Allen* and will uphold a permissive presumption "so long as the presumed fact is rationally connected to a proven fact." *Davis v. Allsbrooks*, 778 F.2d 168, 172 (4th Cir. 1985). The Fifth Circuit, relying upon *Francis v. Franklin*, 471 U.S. 307, 315 (1985), will strike a permissive inference "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts." *Coleman v. Butler*, 816 F.2d 1046, 1048 (5th Cir. 1987).

The First Circuit engages in a two-part analysis that initially examines whether the instruction is mandatory or permissive. If permissive, the court will uphold the inference "if

there is a rational connection between the predicate and presumed facts." *McInerny v. Berman*, 621 F.2d 20, 23 (1st Cir. 1980), *cert. denied*, 449 U.S. 867 (1980) (citing *Ulster Cy. v. Allen*, 442 U.S. at 157).

The common theme throughout the circuits is that the connection permitted by the inference need only be a rational one, justified by reason and common sense. If the connection is rational, then the constitutionality of the inference is to be determined by referring to the facts of the particular case in order to determine whether a rational jury could have made the connection permitted by the inference. The standard set by the other circuits is in dramatic contrast to that set by the Ninth Circuit. The Ninth Circuit disregards whether the connection is rational. Instead, it judges the inference on its face, without reference to the facts and requires the inferred fact to flow more likely than not from the proven fact.

Utilizing the *Allen* standard, as applied by the Eleventh Circuit and urged in this petition, it would be Schwendeman's burden to prove that the connection between speeding and recklessness is not a rationale one, justified by reason and common sense. However, reason and common sense urge that speeding and recklessness are indeed rationally connected. Therefore, Schwendeman's burden would be to prove that no rational jury could have made the connection between speeding and recklessness in light of the evidence that Schwendeman was driving his pick-up truck 25 miles per hour over the limit, with a load of passengers in the back, down a rural road at night, while intentionally weaving and then crashing into a telephone

pole, severely injuring two of his passengers. This is the burden that the state courts and the district court held Schwendeman to and which he failed to meet. This is the standard that meets the requirements of due process and fundamental fairness required by the Constitution. This is the standard that Petitioner urges this Court to clearly announce, thereby allowing the state and federal courts to consistently apply a uniform test when reviewing permissive inferences.

This Court should grant certiorari to resolve the split in the circuits created by the Ninth Circuit's decision and reaffirm the standard that was stated in *Allen*, a standard that requires the defendant to bear the burden of proving that a permissive inference is invalid as applied, by demonstrating that under the facts of the particular case, no rational trier of fact could have made the connection permitted by the inference.

VI. CONCLUSION

For the reasons stated above, Petitioner respectfully prays that this Court grant certiorari.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 91-35626
D.C. NO.
CV-90-1386-WLD

OPINION

DAVID SCHWENDEMAN,
Petitioner-Appellant,

v.

ARTHUR WALLENSTEIN, Director, King County Jail,
Respondent-Appellee.

Appeal from the
United States District Court
for the Western District of Washington
William L. Dwyer
District Judge, Presiding

Argued; Submission Deferred
February 4, 1992 – Seattle, Washington

Resubmitted July 7, 1992

Filed July 27, 1992

Before: Procter Hug. Jr.,
John T. Noonan, Jr., and
David R. Thompson, Circuit Judges

Opinion by Judge Thompson

SUMMARY

Criminal Law and Procedure/Criminal Acts/Juries/Habeas Corpus/Individual Rights/Constitutional Rights

Reversing and remanding a district court judgment denying habeas relief, the court of appeals held that a state court

instruction that the jury could infer that appellant had driven in a reckless manner solely from the fact that he had been speeding was constitutionally deficient and constituted prejudicial error.

Appellant David Schwendeman was convicted in a Washington state court of vehicular assault. At trial, the jury was instructed that they could infer Schwendeman had driven in a reckless manner, the predicate act required for his assault convictions, solely from evidence that he was speeding. After exhausting his state court remedies, Schwendeman unsuccessfully filed a petition for habeas relief in federal district court. Schwendeman argued that the jury instruction given violated his right to due process under the fourteenth amendment because it permitted the jury to infer an element of the crime with which he was charged simply from evidence that he was speeding.

[1] Although the jury instruction in question permitted the jury to infer recklessness solely from proof of excessive speed, [2] a permissive inference jury instruction is constitutional so long as it can be said with substantial assurance that the inferred fact is more likely than not to flow from the proved fact on which it is made to depend. [3] Although it is certainly true that excessive speed is probative of a jury's determination of recklessness, here the court could not say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed. Thus, the instruction was constitutionally deficient. [4] Because the instruction in question isolated speed as the only circumstance needed to permit the jury to find reckless driving and thereby convict Schwendeman, the erroneous instruction was not harmless. [5] By focusing the jury

on the evidence of speed alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which Schwendeman was convicted without considering all the evidence presented at trial.

COUNSEL

David Allen, Allen & Hansen, Seattle, Washington, for the petitioner-appellant.

John M. Jones, Assistant Attorney General, Olympia, Washington, for the respondent-appellee.

OPINION

THOMPSON, Circuit Judge:

David Schwendeman appeals the denial of his habeas corpus petition filed under 28 U.S.C. § 2254. He contends the Washington state court jury that convicted him of two counts of vehicular assault was erroneously instructed, in violation of the fourteenth amendment to the United States Constitution. The jury was instructed they could infer Schwendeman had driven in a reckless manner, the predicate act required for his assault convictions, solely from evidence that he was speeding. We hold that the challenged instruction was constitutionally deficient and the error in giving it may not be excused as harmless. We reverse with instructions to the district court to grant the writ

unless within a reasonable time Schwendeman is afforded a new trial.

I

There was plenty of evidence to support Schwendeman's conviction. At around 11:30 p.m., after having spent two hours with six companions at a local tavern drinking beer, playing pool and dancing, Schwendeman and his friends left the tavern in his pickup truck. Schwendeman drove. Two of his passengers rode up front in the cab with him, and four rode in the back in the truck bed. By his own admission, Schwendeman drove 37 miles per hour in a 25-mile-per-hour zone. According to the state's evidence, he drove in excess of 39 miles per hour and one of his passengers testified he drove in excess of 50 miles per hour. He swerved back and forth on the road, he said to avoid hitting potholes, but there was other testimony that he was purposely trying to hit the potholes. He lost control of the truck and hit a telephone pole, causing injuries to his passengers.

Under Washington law, reckless driving is defined as driving a motor vehicle in wanton or willful disregard for the safety of persons or property. RCW 46.61.500(1). Given the evidence presented at his trial, Schwendeman's conviction would be unremarkable. But, as sometimes occurs, the jury was not given a simple set of instructions which would have permitted them to consider all of the evidence and arrive at a verdict. Instead, the trial court gave the jury the following instruction number 7:

> A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.
>
> This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

Schwendeman argues this instruction violated his right to due process under the fourteenth amendment because it permitted the jury to infer an element of the crime with which he was charged, reckless driving, simply from evidence that he drove in excess of the speed limit. The state argues to the contrary, and also contends that Schwendeman's habeas petition should have been dismissed in any event because he failed to exhaust his state court remedies.

II

A. Exhaustion of State Remedies

On direct appeal, the Washington Court of Appeals affirmed Schwendeman's convictions. The Washington Supreme Court denied his motion for discretionary review.

Schwendeman next filed a personal restraint petition with the Washington Court of Appeals. That petition was dismissed. He then filed a motion for discretionary review with the Washington Supreme Court. He argued that the trial court's instruction number 7 created an unconstitutional inference of his guilt, and that his counsel's failure to raise this issue on direct appeal constituted ineffective assistance of counsel. The Washington Supreme Court denied the motion for discretionary review.

Schwendeman then filed a habeas corpus petition in the district court. He alleged that jury instruction number 7 impermissibly permitted the jury to infer his guilt in violation of the fifth and fourteenth amendments, and that his counsel was ineffective because he did not raise this issue on direct appeal.

Under 28 U.S.C. § 2254(b), "[a]n application for a writ of habeas corpus . . . pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." Section 2254 does not directly address the problem of mixed petitions. *Rose v. Lundy*, 455, U.S. 509, 516 (1982). In *Lundy*, the Supreme Court held that a district court must dismiss "mixed petitions" that include both exhausted and unexhausted claims. *Id.* at 510. A claim is considered exhausted when it has been fairly presented to the highest state court. *Tamapua v. Shimoda*, 796 F.2d 261, 262 (9th Cir. 1986); citing *Picard v. Connor*, 404 U.S. 270, 276 (1971); and *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985). A habeas petitioner may, however, reformulate the claims made in state court; exhaustion requires only that the substance of the federal claim be fairly presented. *Tamapua v. Shimoda*, 796 F.2d at 262.

Here, the parties agree that Schwendeman's constitutional challenge to jury instruction number 7 was fairly presented to the Washington Supreme Court. We are also satisfied that Schwendeman raised the issue of ineffective assistance of counsel in his motion for discretionary review which he presented to the Washington Supreme Court. In denying that motion, the court stated: "[s]ince the instruction was not erroneous, petitioner's

appellate counsel did not represent him inadequately by failing to raise the issue on appeal."

We conclude Schwendeman exhausted his state court remedies. We now consider the district court's denial of his habeas petition on its merits.

B. Merits

[1] Instruction number 7 allows, but does not require, the jury to infer recklessness solely from proof of excessive speed. The inference it allows is permissive.

[2] Recently, in *United States v. Rubio-Villareal*, No. 89-50655, slip op. at 6453 (9th Cir. June 11, 1992) (en banc), we noted that a permissive inference jury instruction is constitutional "so long as it can be said 'with substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'" *Id.* at 6457 (citing *Ulster County v. Allen*, 442 U.S. 140, 166 n.28 (1979).[1]

[3] Although it is certainly true that excessive speed is probative of a jury's determination of recklessness, here we cannot say with substantial assurance that the inferred fact of reckless driving more likely than not flowed from the proved fact of excessive speed. Under *Ulster County*, the instruction was constitutionally deficient. *See Ulster County*, 442 U.S. at 166 n.28; *Rubio-Villareal*, slip op. at 6453.

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[1]We did not reach the constitutional question in *Rubio-Villareal*, because there we held the permissive inference instruction was defective as a matter of federal law. *See Rubio-Villareal*, slip op. at 6458.

A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Id.* at 6458 n.3. An error is harmless beyond a reasonable doubt when "there is no reasonable possibility that the error materially affected the verdict." *Id.*

As we have said, there is ample evidence from which the jury could have found reckless driving. Schwendeman was driving an open-bed truck with passengers in the back at night down a road with potholes, swerving from side to side and exceeding the speed limit.

[4] But instruction number 7 isolated speed as the only circumstance needed to permit the jury to find reckless driving and thereby convict Schwendeman. The jury was told, in effect, that it could ignore all the other evidence, consider only the evidence of Schwendeman's speed, and if it found Schwendeman was exceeding the speed limit, that was enough to convict him—not of speeding, but of reckless driving.

[5] By focusing the jury on the evidence of speed alone, the challenged instruction erroneously permitted the jury to find an element of the crime of which Schwendeman was convicted without considering all the evidence presented at trial. *See Rubio-Villareal*, slip op. at 6465. We cannot say there is no reasonable possibility that the instruction did not materially affect the verdict. Accordingly, the error cannot be excused as harmless.

The district court's denial of the petition for a writ of habeas corpus is reversed. This cause is remanded to the district

court with instructions to issue the writ of habeas corpus unless, within a reasonable time, Schwendeman is granted a new trial.[2]

REVERSED and **REMANDED** for further proceedings.

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[2]We do not reach Schwendeman's ineffective assistance of counsel claim.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C90-1386WD

ORDER DISMISSING PETITION

DAVID SCHWENDEMAN,

Petitioner,

v.

ARTHUR WALLENSTEIN,

Respondent.

The Court, having reviewed the petition for habeas corpus, the respondent's motion to dismiss, the Report and Recommendation of Judge John L. Weinberg, United States Magistrate Judge, and the remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation;

(2) Respondent's motion to dismiss the petition for failure to exhaust state court remedies is DENIED;

(3) The petition is DENIED on the merits without an evidentiary hearing;

(4) This action is DISMISSED with prejudice; and

(5) The Clerk is directed to send copies of this order to counsel for petitioner, to counsel for respondents, and to Judge Weinberg.

DATED this 8th day of May, 1991.

WILLIAM L. DWYER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C90-1386WD

REPORT AND RECOMMENDATION

DAVID SCHWENDEMAN,

Petitioner,

v.

ARTHUR WALLENSTEIN,

Respondent.

In 1988 petitioner was convicted in the King County Superior Court on two counts of vehicular assault. Through counsel, he seeks habeas relief under 28 U.S.C. §2254. He claims the trial court's jury instruction number 7 violates due process. He also claims counsel on appeal was ineffective for failing to challenge this instruction on direct appeal to the state courts.

Respondent has filed a response to the merits of the petition (docket 35). Respondent also moves to dismiss the petition for failure to exhaust state court remedies (docket 33). Petitioner opposes the motion to dismiss (docket 37).

I recommend the court deny respondent's motion to dismiss for failure to exhaust, and deny the writ and dismiss this petition without an evidentiary hearing.

EXHAUSTION

Respondent says petitioner's ineffective assistance claim was not presented to the state courts on the same legal and factual

basis now presented for federal review. Nothing factual is offered to support this claim. Respondent does not point to any distinction between the claims presented to the respective courts. Nor is any distinction apparent. Respondent's claim regarding exhaustion should be denied.

THE MERITS

The relevant facts are not disputed. In 1987 petitioner and six other people went to a tavern in petitioner's pickup truck. Sometime around midnight the same group got back into petitioner's truck and left the tavern. Petitioner drove. Two people rode with him in the cab of the truck. Four other people rode in the open back of the truck. Within minutes of leaving the tavern the truck left the road, hit a telephone pole and two passengers in the back of the truck were seriously injured.

At trial the evidence showed that petitioner was intentionally weaving from side to side on the road. The legal speed limit on this road was 25 miles an hour. Petitioner claimed he was driving approximately 35 miles an hour. He presented the opinion of an expert who supported this estimate.

Passengers in the back of the truck testified that the vehicle was travelling at about 50 miles an hour. The state put forth the testimony of an expert who supported this estimate, and testified further that the truck was travelling at least 39 miles an hour after it hit the telephone pole.

The only issue at trial was whether petitioner was driving in a reckless manner and caused the injuries sustained by passengers. The challenged jury instruction reads:

> A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.
>
> This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is given. Jury Instruction 7.

Petitioner alleges that this jury instruction violated due process by creating an inference from which the jury could find the crucial element of recklessness without sufficient evidence.

In support of this argument petitioner seems to make some faint argument that the challenged instruction creates a mandatory rather than permissive inference. Docket 11 at 7. The distinction is highly relevant to the constitutional analysis applicable.

There can be no serious argument that the challenged instruction creates a mandatory inference. It "allows -but does not require- the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and places no burden of any kind on the defendant." *Ulster County v. Allen*, 442 U.S. 140, 157 (1979). The instruction not only clearly states that recklessness may be inferred from driving over the speed limit, it goes on to state in unequivocal language that any inference is completely up to the jury.

Such an inference affects due process only if "under the facts of the case, there is no rational way the trier could make the connection permitted from the inference." *Id.* Only then "is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." *Id.*

Under the facts of this case there is more than a sufficient rational connection between the evidence of speeding and the factual conclusion that petitioner was reckless. Available to the jury was evidence that on a rural road, after dark, petitioner was traveling at least 39, and possibly 50 miles an hour in a 25 mile an hour zone and hit a telephone pole while intentionally weaving.

Petitioner cannot support the contention that no rational trier of fact could have inferred from this evidence that he was driving recklessly. The evidence at trial was sufficient to support the inference allowed by the trial court's instruction number 7, and sufficient to support the conviction.

Because this claim provides no basis for relief, there can be no validity to petitioner's claim that appellate counsel was constitutionally ineffective for failing to raise the claim on direct appeal to the state courts. A review of the petition and answer establishes that there is no need for an evidentiary hearing; and that petitioner is not entitled to relief.

Pursuant to Rule 8(a) of the Rules Governing §2254 cases, therefore, I recommend the court deny respondent's motion to dismiss for failure to exhaust, but deny the petition on the merits and dismiss this action without an evidentiary hearing. A proposed order accompanies this report and recommendation.

DATED this 21 day of March, 1991.

John L. Weinberg
United States Magistrate Judge

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR KING COUNTY

CASE NO. 87-1-03948-6

STATE OF WASHINGTON,

Plaintiff,

v.

DAVID ALAN SCHWENDEMAN,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

* * *

NO. 7

A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.

This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

* * *

APPENDIX E

THE SUPREME COURT OF WASHINGTON

NO. 57411-1

RULING DENYING MOTION FOR DISCRETIONARY REVIEW

In re the Personal
Restraint Petition of

DAVID SCHWENDEMAN,

Petitioner.

In this personal restraint petition, filed initially in Division One of the Court of Appeals, David Schwendeman challenges his 1988 conviction for two counts of vehicular assault. The Acting Chief Judge dismissed the petition in an order filed July 16, 1990. Mr. Schwendeman now moves for discretionary review by this court. RAP 16.4(c); RAP 13.5.

Petitioner principally challenges jury instruction number 7:

> A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.
>
> This inference is not binding on you and it is for you to determine what weight, if any, such inference is to be given.[1]

Petitioner argues that this instruction created an unconstitutional inference or presumption, and thereby relieved the State of its burden of proving the recklessness element of vehicular assault.

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[1]This is a pattern instruction (WPIC 95.03), based on RCW 46.61.465, which provides that speeding is prima facie evidence of recklessness.

See Sandstrom v. Montana, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979) (such presumptions are unconstitutional); RCW 46.61.522(1)(a) (a person is guilty of vehicular assault if he operates a vehicle in a reckless manner and thereby proximately causes serious bodily injury to another).

This instruction plainly does not contain the classic form of mandatory presumption. The instruction does not say the jury "must" or "shall" presume or infer recklessness upon a finding of excessive speed. *Compare Sandstrom v. Montana, supra* (such language creates mandatory presumption). Nor were the jurors told they could or should draw such an inference "unless" certain other facts were established. *Compare State v. Johnson*, 100 Wn.2d 607, 618-19, 674 P.2d 145 (1983), *overruled on other grounds, State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985) (jury can interpret "unless" clause as creating mandatory presumption). The instruction says simply that the jurors "may infer" recklessness from proof of excessive speed; it then goes on to specify that the inference is "not binding." I therefore agree with the Acting Chief Judge's conclusion that the instruction creates only a permissive inference. *See County Court of Ulster Cy. v. Allen*, 442 U.S. 140, 160-61, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979) (instruction which said jury "may infer" ultimate fact from proof of "presumptive evidence" and said the inference "need not be rebutted by affirmative proof" held to create permissive inference); *State v. Ratliff*, 46 Wn. App. 325, 330, 730 P.2d 716 (1986) (instruction which said "malice may be inferred" from proof of certain facts held to create permissive inference).

Petitioner contends, however, that the instruction is invalid even if it creates only a permissive inference. Again, I find no error in the Acting Chief Judge's decision to the contrary. "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." ***Francis v. Franklin***, 471 U.S. 307, 314-15, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985); ***see also County Court of Ulster Cy. v. Allen, supra*** at 157 (such inferences are valid unless "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference"). If the jury believed the State's witnesses, as it had a right to do, petitioner was driving about 50 miles per hour in a 25-mile zone. Even if the jury believed petitioner's witnesses, he was driving between 35 and 40 miles an hour. It is undisputed that he was driving a pickup truck and the victims were riding in the truck bed. A rational trier of fact could readily find that his speeding, under these circumstances, constituted reckless driving. ***See*** RCW 46.61.500(1) (defining reckless driving as driving a vehicle in wilful or wanton disregard for the safety of persons or property).

These conclusions regarding the inference instruction dispose of petitioner's remaining contentions as well. Since the instruction was not erroneous, petitioner's appellate counsel did not represent him inadequately by failing to raise the issue on appeal. ***See generally Evitts v. Lucey***, 469 U.S. 387, 83 L. Ed.

2d 821, 105 S. Ct. 830 (1985).[2] Similarly, since petitioner's claim does not entitle him to relief in this proceeding, he was not prejudiced by the Court of Appeals' refusal to authorize his release on bail pending its disposition of the petition.

In sum, petitioner has not shown that review is merited under RAP 13.5(b).

The motion for discretionary review is denied.

Geoffrey Crooks
COMMISSIONER

September 25, 1990

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[2]In his pleadings to the Court of Appeals, petitioner also challenged the effectiveness of his trial counsel. He does not mention that issue in his motion for discretionary review, however, and I consider it to be abandoned. *See* RAP 13.7(b).